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THE TTAB

May 2, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jose J. Granada

Serial No. 76317292

Bernhard Kreten for Jose J. Granada.

Brian J. Pino, Trademark Examining Attorney, Law Office 114
(Margaret Le, Managing Attorney).

Before Hanak, Quinn and Drost, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Jose J. Granada (applicant) seeks to register in typed drawing form BONDGRAPH for "computer software programs in the fields of engineering and computer science, namely, computer software programs for use in the modeling and simulation of dynamic systems that are comprised of interrelated modules." The application was filed on September 9, 2001 with a claimed first use date of December 14, 1982.

The Examining Attorney has refused registration on two grounds. First, citing Section 2(e)(1) of the Trademark

Act, the Examining Attorney contends that applicant's mark is merely descriptive of applicant's goods. In addition, the Examining Attorney contends that applicant's showing of acquired distinctiveness for its mark pursuant to Section 2(f) is insufficient. Second, the Examining Attorney contends that "applicant's identification of goods is not acceptable because it does not accurately describe the goods and uses terminology that will not be understood by the average person." (Examining Attorney's brief page 8).

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

A mark is merely descriptive pursuant to Section 2(e)(1) of the Trademark Act if it immediately conveys information about a significant quality or characteristic of the relevant goods or services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986). Of course, it need hardly be said that the mere descriptiveness of a mark is judged not in the abstract, but rather is judged in relationship to the goods or services for which the mark is sought to be registered. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 216

(CCPA 1978) Finally, when goods or services are marketed to professionals as opposed to the general public, it is the views of the professionals who purchase or use the goods or services that determines whether a mark is descriptive or generic. Magic Wand, Inc. v. RDB, Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991).

We find that based upon this record, the evidence is overwhelming that applicant's mark is, at a very minimum, extremely highly descriptive of its goods. Moreover, we find that applicant's rather meager showing of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act does not begin to demonstrate that this highly descriptive (if not generic) term BONDGRAPH has acquired a secondary meaning indicating that the particular goods emanate only from applicant.

The Examining Attorney has literally made of record hundreds of stories taken from the Internet and other data bases wherein the term "bond graph" is used to describe or indeed name applicant's goods, that is, computer software programs for use in modeling and simulation of dynamic systems. This evidence demonstrates there are numerous web sites that deal specifically with bond graphs. One web site is named "BondGraphs.com." Another is named "The Bond Graph Compendium." Moreover, a journal is published

entitled The Bond Graph Digest. In addition, the Examining Attorney has made of record pages from the Internet showing that there are conferences on the subject of bond graphs. Indeed, one web site is specifically entitled "Bond Graph Modeling Conferences." Moreover, universities and other institutions teach courses that are devoted to the subject of bond graphs. In this regard, there is a web site entitled "Bond Graph Modeling Courses and Teaching Materials."

One of the articles on the "BondGraphs.com" website has a discussion about the founder of bond graphs. It reads, in part, as follows: "It is with great sorrow that on Friday, June 14, 2002, the inventor of bond graphs, Henry M. Paynter, died suddenly. ... In 1959 he published the first book on bond graphs ever published. Until death, he was a Professor of Mechanical Engineering Emeritus at MIT" and a winner of the Nobel Prize. Another article found on yet a different edition of "Bond Graphs.com" speaks of another pioneer in the field of bond graphs in the following manner: "It is with great sorrow that on Sunday, March 25, 2001 one of the bond graph pioneers, Jan van Dixhoorn, suddenly died. ... One of his early contributions to the field of modeling and simulation was he realized in the late sixties that simple process computers could be

used as an easy to use tool for the simulation of the simple dynamic models that control engineers use. ... After he encountered bond graphs, Jan realized that a casual bond graph is just a compressed block diagram, so he proposed to add input facilities that made the first bond graph software that was able to deal with nonlinear models."

These two articles demonstrate that Professor Paynter published a book on bond graphs as early as 1959, and that by the 1970's, Mr. Dixhoorn had developed bond graph software for modeling, the very type of goods for which applicant seeks to register its purported mark BONDGRAPH, a mark which applicant acknowledges he did not even allegedly use until 1982.

As noted earlier, the Examining Attorney has made of record literally hundreds of Internet articles and other articles showing that today there are websites dealing specifically with bond graphs, that there are journals specifically devoted to bond graphs, that there are conferences on bond graphs and that there are courses that teach how to use and develop bond graphs. In light of this massive evidentiary showing, we have no doubt that the term "bond graphs" is, at an absolute minimum, extremely highly descriptive of applicant's goods, namely, computer software programs for use in the modeling and simulation of dynamic

systems. Indeed, the record strongly suggests that the term "bond graphs" is a generic term for applicant's goods.

In arguing that his mark is not merely descriptive, applicant states at page 3 of his brief that "the 'average' person has a miniscule chance of comprehending the goods of the present mark ... [and] it is incomprehensible that the description of such goods could be specific enough to explain to the 'average person' what the function of the software is." Applicant's argument is misplaced. As noted earlier in this opinion, when one deals with goods directed to professionals as opposed to the average consuming public, then the mere descriptiveness or genericness of the mark is judged from the standpoint of that relevant professional public.

As for applicant's showing of acquired distinctiveness pursuant to Section 2(f), suffice it to say that it is woefully lacking. Beyond pointing out that applicant has continuously used his mark for over five years, applicant's attorney merely argues, without any evidentiary support, that applicant's "aggregate sales are in the six-figure range, and its advertising expenditures are in the five-figure range." (Applicant's brief page 3). We have two problems with applicant's "evidence." First, it is not evidence at all because it was not submitted in the form of

a declaration or affidavit by one who would have knowledge of the facts. Rather, said sales and advertising figures were merely put forth by applicant's attorney who did not explain how he obtained the knowledge of applicant's sales and advertising figures. Second, even if we were to assume that applicant's total sales figures are in the six-figure range and that applicant's total advertising figures are in the five-figure range, this merely means that since 1982 applicant has sold at least \$100,000 of its BONDGRAPH products and that it has spent at least \$10,000 in advertising such products. It is well established that as a mark's descriptiveness increases, a significantly greater showing of acquired distinctiveness is required in order to prove that the mark has now acquired secondary meaning in that it indicates primarily applicant as a source of the goods. Yamaha International Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). Given the highly descriptive nature of applicant's mark, we find that applicant's sales and advertising figures, even if properly proven, would still be inadequate to establish secondary meaning. Moreover, the mere fact that applicant has used its mark for five years is of no avail because the mark is so highly descriptive.

Given the fact that the refusal to register applicant's mark on the basis that it is highly descriptive and that applicant's Section 2(f) showing is inadequate is so well founded, we elect not to consider whether applicant's description of his goods is adequate.

Decision: The refusal to register is affirmed solely on the basis that applicant's mark is merely descriptive of applicant's goods, and applicant has failed to establish that its mark has acquired distinctiveness pursuant to Section 2(f) of the Trademark Act.